UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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J.K.J., Case No. 15-CV-428-WMC

Plaintiff,

vs.

POLK COUNTY and
DARRYL L. CHRISTENSEN,

Defendants.

and

M.J.J., Case No. 15-CV-433-WMC

Plaintiff,

vs.

POLK COUNTY and
DARRYL L. CHRISTENSEN,

Defendants.

Madison, Wisconsin
February 1, 2017
12:00 p.m.

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STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF JURY TRIAL
AFTERNOON SESSION - **INSTRUCTION CONFERENCE**
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiffs:
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For Defendant Darryl L. Christensen:
Crivello Carlson, S.C.
BY: SARA C. MILLS
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Also Present: Peter Johnson, Polk County Sheriff

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(Called to order at 12 p.m.)

THE COURT: I am going to hear from the parties one additional time as to instructions, understanding that the County has not had an opportunity to review or, at least by misplacement of the instructions, lost an opportunity to comment on the final version. I will add two comments before I hear from each party, beginning with the County.

The first is that I am struggling with whether there

is really any reasonable argument about harm with respect to the claim against Mr. Christensen. It seems to me that his liability turns on the straightforward proposition as to his perception of the potential harm and whether he was deliberately indifferent to plaintiffs' health and safety. I should say "a substantial risk of serious harm." But I don't know that there's any way to argue that these plaintiffs were not harmed by his conduct. And if I remove harm as an element, then that also obviously removes the two paragraphs on harm.

I will hear argument from Ms. Mills on that subject. But I don't know how a reasonable jury could conclude that his conduct was not harmful, whether some aspect was arguably not unwelcome within the jail. Even then I don't see an argument that there wasn't harm done to these plaintiffs. But I will hear from Ms. Mills on that subject.

As for the County, in reviewing the motion for directed verdict it occurs to me that there may be one change that would be appropriate, notwithstanding what I think is a distinction that is not supported by the law generally as to *Monell* liability as opposed to liability through a policy-maker's direct acts or lack of acts if they had actual knowledge of sexual misconduct by Mr. Christensen, which is not in this case and there's

been no evidence of that.

But it occurs to me that on page 5 that, in subclause 2, perhaps it would be correct under the law to make clear "the plaintiffs' obligation is to prove both that the policy-maker official or officials" -- and I guess it would be here *officials*, so we could eliminate the word *official* -- "were deliberately indifferent to the need for more or different training to avoid likely sexual assault of an inmate by an officer," and then I had written "or that this was obvious to the policy-makers."

But the point is a fair one by the County that I think it should be "and that this was obvious to the policy-making officials." I'm not sure why we capitalize *policy* in that second one, so I would lower case that, but I would change the "or" to "and." Those two comments are those the Court may need to make. Aside from the objections that you've preserved, Mr. Bohl or Mr. Cranley, I'd be happy to hear any further objections you have.

MR. BOHL: I'm not entirely sure what I've preserved, so I'll take 20 seconds and say it again. With regard to numbered paragraph 2 on page 5, I believe you should delete everything after what is now an "and" -- "and that that was obvious to policy-making officials." If you don't delete it, I think you need to say "and that it was actually known to policy-making officials."

THE COURT: And I just don't know how you could say that. The language that you quoted to me in your brief makes clear that it is notice or constructive notice. Constructive notice is not actual knowledge. If there was actual knowledge -- the standard is *obvious* and that is the language that I believe appears in the exact language you quoted back to the Court on page 5 of your own motion quoting the Seventh Circuit: the need for training, and I'm paraphrasing, was "plainly obvious" -- and that's a quote -- "plainly obvious" to the city policy-makers. There's no statement about actual knowledge; it's just "plainly obvious." It's not just a subjective test. There is constructive notice, which is an objective test.

MR. BOHL: I'm not waiving my objection, but will Your Honor put the word *plainly* in front of *obvious*, "and that this was plainly obvious to policy-making officials"?

THE COURT: I'll consider that. Anything more from the County?

MR. BOHL: Yes, one last objection. The third line of paragraph 5, the words "must have known." I submitted a brief on that. There's no point in us rearguing it.

THE COURT: I'm sorry. I've lost you. On what page are you?

MR. BOHL: Page 5, the third line, the end of the third line there is a phrase "must have known." I object to the "must have known." I believe it should be "there was actual knowledge."

THE COURT: And I disagree for the same reason. Anything more for the County?

MR. BOHL: No, just the word *plainly*, Your Honor.

THE COURT: I understand that's your request and I said I would consider it. I'll hear from, since I raised the issue as to harm, I'll hear from Ms. Mills next.

MS. MILLS: Your Honor, I think in these kind of cases in general it's an extremely close call. There are, for most cases, when deliberate indifference is found, that that third issue is an extremely close call and oftentimes a very likely tipping in the favor of harm being found. That said, I think it still is a close call and I think it's one for the jury.

THE COURT: Well, here's what I'm going to do as a compromise: I'm going to eliminate this element in liability. But if liability is found, I will make part of the damages phase *harm* and *damage* and give this instruction as to thinking about harm and maybe give that as a separate element. Before they could award damages, they have to find harm. But I think it's a distraction to

this jury. I think it is -- I don't know how you could -- what would be your argument that there was no harm done by virtue of your client's conduct?

MS. MILLS: Well, the argument would be that, well, it just goes to consent and whether this was something that ultimately caused the harm being alleged.

THE COURT: And I just -- I can't see a reasonable jury concluding that your client's conduct -- which, after all, was criminal in nature and was a gross abuse of his office -- did not do at least some harm to these plaintiffs. But if you insist, you can argue that element as part of the argument on damages. And so I will give you that opportunity, but it won't be during the liability phase of the trial. All right. Anything else for the defendant, Mr. Christensen?

MS. MILLS: No, Your Honor.

THE COURT: Anything more for the plaintiffs?

MS. BANNINK: I have a few things. As a clarification on the ruling that you just made, would that take out those two paragraphs that you had proposed with regard to --

THE COURT: As I said, I would remove the third element as to Mr. Christensen and I would eliminate those two paragraphs at the top of 4, with the understanding that the defendants will be allowed to argue a lack of

harm as part of the damages phase. So that the jury will first need to decide whether there was harm, and then whether there was damages, notwithstanding the Court's view that no reasonable jury could conclude no harm was done to these plaintiffs. Anything more for the plaintiffs?

MS. BANNINK: A few things. First, I think that on page 5, when you took out "official or officials" --

THE COURT: Yes.

MS. BANNINK: -- I think that both of them should stay in there, given that the paragraph --

THE COURT: I don't disagree. As I think about it, I suppose they could find one, but --

MS. BANNINK: Just Nargis.

THE COURT: -- but not both. Understood. Yeah.

MS. BANNINK: And then as to the "or" in paragraph 2 --

THE COURT: Yes.

MS. BANNINK: -- that is consistent with Pattern Jury Instruction 7.21.

THE COURT: And I'm aware of that. My real concern is whether they're right, that instruction is consistent with Seventh Circuit case law, and I'm not sure it is correct.

MS. BANNINK: And I haven't had the chance to

research that. I can do that over the lunch hour.

THE COURT: That's fine and I would consider your argument on that. I will try to be back in the courtroom at 1:30. If you have some authority to confirm that, you're also welcome to make any argument you wish during that time. You're also welcome to make any argument at that time as to the addition of the "plainly obvious." That was the suggestion made by the County. I have not ruled on its inclusion.

MS. BANNINK: Which was also in paragraph --

THE COURT: The same paragraph.

MS. BANNINK: -- 2.

THE COURT: After where I was proposing to change to "and," it would read, "and that this was plainly obvious to policy-making official or officials."

MR. WEIDNER: Your Honor, with regard to that, it seems redundant. What is obvious is plain and it seems completely unnecessary.

THE COURT: I am not disagreeing. And since it's not in the pattern instruction, I might default against including it. But I'll hear from both sides when we reconvene and before the jury comes out.

Once I finalize these instructions, they will be read to the jury before closing arguments. They will be displayed on the overhead so that the jury can follow

along, because I find that's helpful for their absorbing the instructions before you make your arguments.

And then we will proceed with closing arguments for both sides. Do you have a rough idea of the length of your closing?

MR. WEIDNER: Roughly -- well, consider a half hour. That's as rough as I can get.

THE COURT: That's fine. And something similar for the County?

MR. BOHL: Or less.

THE COURT: All right.

MS. MILLS: Less.

THE COURT: All right. Very good. Then we'll certainly be giving the final deliberation instructions to the jury and proceeding to deliberations on liability this afternoon. And at that time we will take up the damages instruction, which I will revise over the lunch hour to include to moving this harm issue into that instruction. And we'll take that up at the break as well as any other issues that may remain for purposes of your damages case. Yes.

MS. BANNINK: One additional point of clarification as to their preparation for closing instructions: with the removal of that element 3 as well as the *consent*, will defendant Christensen's counsel be

able to argue -- continue to argue consent?

THE COURT: I don't know what its relevance would be, so no. The relevant arguments for this portion of the case will be as to her client's -- as to "plaintiffs having been incarcerated under conditions that posed a substantial risk of serious harm to her health or safety," which will dovetail to the County and as to Mr. Christensen being deliberately indifferent to plaintiffs' health or safety. Anything more for the plaintiffs then?

MS. BANNINK: Nothing else. Thank you.

THE COURT: Anything more for the County defendant?

MR. CRANLEY: We do have our Rule 50 motion, Your Honor, renewing our directed verdict motion. And, also, the Court previously invited us to remind you of our governmental immunity under Section 893.80, which we could also raise at this time or after lunch, if you want to hear it, or by briefing it.

THE COURT: It probably makes sense to brief it at this stage because I'm going to let the jury decide it. But the immunity that you're talking about is the cap on damages or something more that you think applies here?

MR. CRANLEY: Discretionary immunity.

THE COURT: For me to exercise?

MR. CRANLEY: For the -- that makes the government immune from liability rising out of its discretionary conduct.

THE COURT: Yeah. I think it would make sense to brief that at this point. I'm going to let the jury decide this if you want to pursue that.

MR. CRANLEY: At this point I want to just make sure it's preserved.

THE COURT: Understood. All right. Anything more then for Mr. Christensen at this time?

MS. MILLS: No, Your Honor.

THE COURT: All right. I will see you back in this courtroom at 1:30. I am moving to another courtroom for sentencing, so you don't need to move anything.

MR. WEIDNER: Just because I need to make it clear, there won't be an argument for consent in the liability phase?

THE COURT: That's correct.

MR. WEIDNER: Thank you, Your Honor.

THE COURT: I guess, since everyone keeps bringing this up, I want to make clear why I'm ruling that way. I do not think a reasonable jury could find that. But to preserve this for the possibility of any appeal, I am going to allow the defendants to make that argument as part of the damages phase with the understanding that were

they to prevail on no harm, I might well direct a verdict as to liability, but then defendants could make an argument to the Seventh Circuit that I got that wrong. But I don't want it to -- I don't want that issue to infect the liability determinations by the jury otherwise, which is why I've separated it out.

And with that, we will take our bleak and reconvene at 1:30. Thank you.

(Lunch recess at 12:15 p.m.)

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I, CHERYL A. SEEMAN, Certified Realtime and Merit Reporter, in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 1st day of February, 2017, before the Honorable William M. Conley, Chief Judge of the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 8th day of February, 2017.

/s/

Cheryl A. Seeman, RMR, CRR
Federal Court Reporter

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